BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MATTHEW S. ROST Claimant	)	
V.	)	
PICKRELL DRILLING CO., INC. Respondent	)	Docket No. 1,069,544
AND	)	
HDI-GERLING AMERICA INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 24, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali Marchant. Robert R. Lee of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 21, 2014, Preliminary Hearing and the exhibits; the transcript of the June 9, 2014, discovery deposition of claimant; the transcript of the June 20, 2014, evidentiary deposition of Dr. James M. Haan and the exhibits; the transcript of the June 27, 2014, evidentiary deposition of Dr. David W. Paine and the exhibits; the transcript of the July 23, 2014, evidentiary deposition of Dr. Denise W. Bruey and the exhibits; the transcript of the June 9, 2014, evidentiary deposition of Susan M. White; the June 20, 2014, evidentiary deposition of Brandon L. Bean; the transcript of the June 20, 2014, evidentiary deposition of Morghan Chambers and the exhibits; the transcript of the July 23, 2014, evidentiary deposition of Rhonda Schmeidler and the exhibits; the transcript of the June 3, 2014, evidentiary deposition of Pam Dater and the exhibits; the transcript of the June 3, 2014, evidentiary deposition of Richard Johnson and the exhibits; the transcript of the June 3, 2014, evidentiary deposition of Melisa Frost and the exhibits; the transcript of the June 9, 2014, evidentiary deposition of Noé Martinez and the exhibits; the transcript of the June 9, 2014, discovery deposition of James Granger; the transcript of the June 9, 2014, discovery deposition of Christopher L. Trimble, Jr.; and the transcript of the June 9, 2014, discovery deposition of Henry Garcia, together with the pleadings contained in the administrative file.

The ALJ found the blood alcohol testing performed in the course of claimant's medical treatment is admissible under K.S.A. 2013 Supp. 44-501(b). Due to a blood alcohol level of .144 at the time of the injury, the ALJ determined claimant was impaired due to alcohol at the time of the accident. The ALJ found claimant's urine drug test results were not admissible due to a failure to satisfy the requirement of K.S.A. 2013 Supp. 44-501(b)(3)(E). The ALJ also found that, although he was impaired at the time of his accident, claimant presented clear and convincing evidence to overcome the presumption his impairment contributed to the accident; therefore, the ALJ found claimant's March 25, 2014, work-related accidental injury to be compensable.

ISSUES

Respondent argues the ALJ's Order should be affirmed in part and reversed in part. Respondent contends the greater weight of the evidence establishes it satisfied the requirements to admit claimant's blood alcohol and drug urinalysis tests into evidence. Moreover, respondent argues claimant was impaired at the time of the injury, and his impairment contributed to the accident.

Claimant contends he sustained an injury arising out of and in the course of his employment and as a result of performing a dangerous job under dangerous conditions. Claimant argues the blood alcohol and drug urinalysis results are not admissible. However, should they be found to be admissible, claimant maintains he has provided clear and convincing evidence to rebut the statutory presumption of impairment contributing to the accident.

The issues for the Board's review are:

1. Are the results of claimant's drug urinalysis testing admissible?

2. Has claimant overcome the presumption of contribution by clear and convincing evidence?

FINDINGS OF FACT

Claimant began employment with respondent in January 2014 as a backup hand on an oil rig. In this position, claimant controlled the left-side tongs when making connections while drilling, tripped pipe, and basically did what he was told by the crew. Claimant worked the morning tour (night shift), which began at 10:30 p.m. and lasted through 7:30 a.m. Usually claimant was taken to work by James Granger, respondent's morning tour driller and claimant's supervisor. On this particular job, claimant and the rest of the four-man crew stayed at a motel near the rig site southwest of Kingman, Kansas.

Claimant testified he returned to the motel following his shift on March 24, 2014, accompanied by Mr. Granger, at approximately 7:30 a.m. Claimant stated he and Mr.

Granger imbibed alcohol, estimating consumption of a 12-pack of beer and a half-pint of bourbon by claimant alone. Neither claimant nor Mr. Granger could recall the amount of alcohol consumed by Mr. Granger. Mr. Granger testified claimant left the room at around 11:00 a.m. or noon. Claimant testified he went to sleep around 1:30 or 2:00 p.m. and slept until approximately 9:00 p.m. that evening. Claimant then drank one beer before arriving for work at 10:30 p.m. Claimant testified the one beer was the last alcoholic beverage he consumed that day. Claimant also admitted to smoking marijuana by himself three to four days prior to March 24, 2014, but denied having done so since that time. Mr. Granger noted claimant was not acting impaired and did not smell of alcohol at 10:30 that evening, stating he would have fired claimant had that been the case.

Christopher Trimble, derrick hand, and Henry Garcia, motorman/chain hand, comprised the remainder of the four-man crew working with claimant and Mr. Granger. The crew arrived onsite at 10:30 p.m. on March 24, 2014, changed into working clothes, and began assembling a tool used for drill stem testing. Once the tool was assembled and inserted into the hole, claimant and his crew placed roughly 4,000 to 4,500 feet of pipe into the hole. This process lasted until approximately 11:45 p.m., when the crew was relieved to go to the "doghouse," a two-story building located on the rig. Mr. Granger explained the crew would not be needed until the conclusion of the test. Mr. Granger, Mr. Trimble, and Mr. Garcia each testified they went to the top floor of the doghouse and went to sleep. All stated claimant retreated to the bottom floor of the doghouse with claimant's friend, Adam Koch. Mr. Koch is not an employee of respondent, but instead arrived onsite at midnight requesting employment. Claimant testified he went to sleep in the bottom floor of the doghouse until he was awoken to return to work. Claimant did not mention Mr. Koch during his deposition.

The crew returned to work somewhere between 4:00 a.m. and 5:00 a.m. on March 25, 2014, when the drill stem testing was complete. Mr. Granger noted Mr. Koch was still onsite at that time, and it was not unusual to have visitors on the rig. Mr. Granger further testified claimant did not seem to be intoxicated or impaired upon his return to the rig deck. Mr. Granger testified:

> Q. And was there any alcohol or anything in that bottom dog house as far as you know?
>
> A. Not to my knowledge.
>
> Q. And that wouldn't be normal for alcohol to be on the rig site, would it?
>
> A. No.
>
> Q. And, certainly, there wasn't any that was taken there by anybody that you supervised; is that correct?
>
> A. Nobody that I supervised.

Q. When you got up at 4:00 that morning, was [claimant] acting any different or stranger than normal?

A. No.

Q. Okay. He wasn't acting drunk or stoned or anything as far as you could tell?

A. No.

Q. And didn't smell of alcohol, did he?

A. Not that I could tell.[1]

Mr. Trimble agreed with Mr. Granger:

Q. And just prior to [claimant's] injury on the morning of the 25th of March, were you working with [claimant]?

A. Yes.

Q. Was he acting any differently or strangely at all?

A. No.

. . . .

Q. Well, did you believe that he was in any way affected by the consumption of alcohol or drugs on the morning of March 25th?

A. Not that I know of, no.

Q. He wasn't acting any differently than you had seen him before?

A. No.

Q. And as far as you know, he was doing his job?

A. Yeah.[2]

---

[1] Granger Depo. at 9-10.

[2] Trimble Depo. at 4-5.

Mr. Garcia also agreed, testifying:

> Q. And did you see any evidence that [Mr. Koch] or [claimant] had been drinking during that –
>
> A. No.
>
> Q. -- 12:30 to 4 a.m. time?
>
> A. No.
>
> Q. Was [claimant] in any way acting any differently or smelling of alcohol?
>
> A. No.
>
> Q. And as far as you could tell, was he doing his job normally?
>
> A. Yes.[3]

All crew members testified the surface of the rig deck was wet, muddy, slick, and cold the morning of March 25, 2014, when the crew began pulling the pipe from the hole. Claimant and Mr. Garcia unscrewed the pipes while Mr. Trimble held the pipe from above and Mr. Granger lowered the pipe. Claimant explained he would unscrew the pipe, grab the pipe from the bottom, push the pipe over and line it up on the deck. Claimant testified he had pulled about half of the total pipe, or 21 pieces, when he lost his footing and slipped. Claimant stated his foot became caught in the rotating drill pipe slip handles, causing him to fall to the ground before he was pulled around the drill pipe. Claimant testified:

> A. . . .I fell directly to the ground and then I went around in a circle once or twice with the table. Then the driller shut it off.
>
> Q. So this thing drug you around in a circle twice?
>
> A. Yes. And my leg went around a time and a half around the drill pipe.[4]

Claimant sustained an open fracture to the left tibia and left fibula as a result of his accident.

Claimant was immediately transported by EMS to Via Christi Hospital St. Francis (Via Christi) in Wichita, Kansas. Records indicated EMS personnel inserted an IV into

---

[3] Garcia Depo. at 6-7.

[4] Claimant's Depo. at 25-26.

claimant and provided morphine for pain control en route to the hospital. Claimant ultimately underwent three surgeries and a skin grafting procedure to repair his left leg.

Upon arrival at the emergency room (ER), claimant was seen by Dr. Denise Bruey. Dr. Bruey ordered x-rays and various blood tests under the assumption claimant would require surgery due to the visible extent of his injuries. Dr. Bruey stated she also ordered a blood alcohol test because claimant smelled of alcohol. She testified:

> He did smell of alcohol. It was not documented in here, we did not document it, but he did smell of alcohol.[5]

Dr. Bruey explained the blood alcohol test was medically necessary because she needed to ascertain his level of intoxication as part of his treatment.

The record is unclear regarding who drew claimant's blood for the alcohol testing. Brandon Bean, an emergency medical technician at the hospital, testified he witnessed a nurse, Rhonda Schuler, draw claimant's blood through an existing IV site. Mr. Bean stated this process must be completed by a nurse. After the blood is drawn, the vials are given to Mr. Bean directly, who labels each specimen individually before double-sealing them into two bags and sending them to the lab via the hospital's pneumatic tube system. Mr. Bean testified no one other than he and the nurse handles the blood specimens prior to insertion into the tube. Mr. Bean indicated this is the extent of his involvement in the process.

Rhonda Schmeidler, RN, was on duty in the ER upon claimant's arrival.[6] She agreed with Mr. Bean's testimony regarding the blood testing process, but had no independent recollection of drawing claimant's blood. She recalled assisting in claimant's initial treatment and transfer to the trauma bay, which occurred a short time after claimant's arrival in the ER. Dr. James Haan, the trauma physician on call, testified the blood alcohol test results generally take about an hour to complete. Dr. Haan noted claimant's wound was probably washed and splinted by the time he received the test results. He agreed that generally, a blood alcohol test is not ordered for a trauma patient unless the patient was involved in a motor vehicle accident or some other reason exists. Dr. Haan testified he was not personally aware why a blood alcohol test was ordered for claimant.

Susan White, a phlebotomy coordinator at Via Christi, is familiar with lab operations at the hospital. Ms. White testified she had no knowledge or information regarding claimant specifically, but she provided information as to the blood alcohol testing procedure. Ms. White explained that after the blood is drawn and labeled, it is sealed into two biohazard bags and placed into the pneumatic tube system for delivery to the lab.

---

[5] Bruey Depo. at 9-10.

[6] The ALJ acknowledged and agreed with respondent's assertion that Rhonda Schuler and Rhonda Schmeidler were more likely than not one and the same person. (See ALJ Order [Nov. 24, 2014] at 3.)

Once the specimen arrives at the lab, the collector on duty retrieves the specimens and places the vials on an automated tracking system. Ms. White stated the entire process of blood testing is automatic, and at no point in time does a human open a vial or remove blood from the vial. Once the automatic machine tests the blood specimen, it is transferred automatically to the refrigeration unit for storage, where it remains for approximately seven days. Ms. White testified this process is performed on all blood samples requiring testing for alcohol.

Richard Johnson, respondent's general manager in charge of accounting, human resources, and regulatory compliance, first learned of claimant's injury at approximately 5:00 a.m. on March 25, 2014. Mr. Johnson stated he contacted Pam Dater, the insurance carrier's claims adjustor, that same day and informed her of the accident. He also requested an accident report from Mr. Granger and Mike Kern, a tool pusher and drilling supervisor on the rig. Mr. Johnson arrived at Via Christi later that afternoon and provided a drug test kit to Morghan Chambers, the RN case manager, pursuant to respondent's post-accident drug and alcohol testing policy. Respondent contracts with Pipeline Testing Consortium (Pipeline Testing) for its drug testing. Mr. Johnson testified:

> I provided [Ms. Chambers] the drug test kit and had advised her that we needed to have that completed within 32 hours of the accident to be within compliance of our policy. I also had checked prior and Via Christi was on the list of approved collection with Pipeline Testing and that there should be someone there available to be able to administer that UA. If there wasn't, then she should contact me and I would have a mobile source come in and do that, but that it was very important that we did in fact get that done.[7]

Noé Martinez, a phlebotomist at Via Christi, testified to taking a urine sample from claimant on March 25, 2014. Mr. Martinez stated he had no specific recollection regarding who gave him the urinalysis test kit, but he agreed it was employer-provided and not one normally used by the hospital. Mr. Martinez explained he opened the kit in claimant's presence and personally provided claimant with a cup to collect urine. Once Mr. Martinez retrieved the urine sample from claimant, he checked that the sample was adequate and the correct temperature. Because a split sample was requested, Mr. Martinez then split the cup of urine into two separate, smaller cups provided in the kit. The cups were then labeled, sealed, and again sealed into a bag for transfer to the hospital lab. Mr. Martinez testified he performed all procedures before claimant, as evidenced by claimant's signature on the drug-testing form also completed by Mr. Martinez on March 25, 2014.[8] After sealing the specimen, Mr. Martinez collected the bagged specimen and any paperwork before personally walking it to the lab. He testified the specimen remained in his custody until

---

[7] Johnson Depo. at 11.

[8] See Martinez Depo., Ex. 1 at 1.

delivery to the lab. Mr. Martinez stated he had no personal knowledge of claimant's test sample after he delivered it to the hospital lab.

Ms. White explained the hospital process once a urine sample to be tested for medical-legal purposes is received in the lab. Ms. White testified the sample is collected by the collector, who then either hand-carries the sample to the main lab or sends it via the hospital pneumatic tube system. The lab processor then retrieves the specimen, which is still sealed in a bag, and confirms the requisition and the specimen match. A form is then signed and dated stating the specimen was received and handled in the lab. After the specimen is matched to the requisition, it is either packed immediately or stored in the refrigeration unit until ready for packing. Ms. White stated the lab retains a copy of any paperwork attached to the sample. At packing time, the specimen is retrieved from refrigeration, the matches are again confirmed, and the sample and any paperwork is sealed into a FedEx envelope complete with tracking label for shipment to a third party. Ms. White testified there is no reason why a urine sample would be removed from the sealed bag at any point while in the lab. She stated she had no personal knowledge regarding claimant's urinalysis and was not involved in its collection or processing.

Melisa Frost, a case management nurse, was subcontracted through an adjusting company to handle claimant's case. Ms. Frost stated she was in contact with Ms. Dater and Ms. Chambers regarding claimant. On March 27, 2014, Ms. Frost visited Ms. Chambers at Via Christi and was informed claimant underwent alcohol testing because he "reeked of alcohol."[9] Ms. Frost also noted claimant was described as unresponsive and unwilling to answer on the pre-op evaluation note. Ms. Frost did not know who specifically requested claimant's blood alcohol testing prior to surgery. She was informed by Ms. Chambers claimant's blood alcohol level result was .144, a positive result. Ms. Frost testified she initially met with claimant on March 27, 2014, and explained her position. Ms. Frost testified:

> A. After my chart review and discussion with Ms. [Morghan] Chambers, I went to his room and introduced myself as the RN case manager hired by workers' comp to oversee his medical care, to facilitate/coordinate any medical needs that he may have at home. And he said, "I don't know" -- he said, "Are you here to help me with money?" And I said, "In what regard?" He said, "Because I don't think workers' comp will be covering this because I was drinking on the job. I need money to pay bills."
>
> . . . .
>
> Q. Did he elaborate anything more about his consumption of alcohol on the date of accident?

[9] Frost Depo. at 12.

> A. My question to him, "Were you drinking on the job?" And he said, "Yes, I was drinking on the job, but I had been a lot more loaded than that on several other occasions, but I have five witnesses that said that I was not drunk."[10]

Ms. Frost stated she again attempted to meet with claimant on March 31, 2014, but claimant informed her he was in too much pain to speak. Ms. Frost had no further communication with claimant.

Dr. David Paine is a medical review officer (MRO) with American Medical Review Officers, who is contracted to perform drug testing review for Pipeline Testing. Dr. Paine described his work as an MRO once he receives drug test results. He said:

> We match up the chain of custody form that was signed by the individual when they gave the drug test with the drug test result that comes out of the laboratory. And if there's a positive result then I do an interview with the individual to discuss what showed up and why and then make a final verification of the result.[11]

Dr. Paine stated this procedure was followed relating to claimant's urinalysis on March 30, 2014. He confirmed the chain of custody identification number matched claimant's specimen identification number. Because the lab confirmed a positive amount of marijuana metabolite in claimant's urine sample, Dr. Paine conducted an interview with claimant on March 31, 2014. Dr. Paine spoke with claimant via telephone, verifying claimant's identity and providing a medical Miranda statement. Dr. Paine testified claimant voiced his understanding, and he answered all questions regarding whether a legitimate explanation for the substance found in the sample existed. Claimant was not taking any medication at the time that could result in a positive marijuana metabolite result. Dr. Paine then asked claimant if he had used marijuana. Dr. Paine said, "[Claimant] said he doesn't remember last use. It's been a while. Could be someone gave [him] some when [he] was drinking."[12]

Dr. Paine verified the results on March 31, 2014, finding claimant's urine was positive for THC, or marijuana metabolite. Dr. Paine offered claimant a split testing, an offer that is made by the MRO during the course of the interview. He testified neither claimant nor anyone on claimant's behalf requested a split sample test. Dr. Paine had no further contact with claimant after the interview. Dr. Paine contacted Mr. Johnson that same day regarding the drug test result and provided a copy of the MRO paperwork.

---

[10] *Id*. at 10-11.

[11] Paine Depo. at 6.

[12] *Id*. at 16.

Ms. Dater also spoke with claimant on March 31, 2014. Ms. Dater stated she was aware of only the blood alcohol test results during their initial conversation. Ms. Dater testified:

> Q. (By Mr. Burnett) What did [claimant] tell you about the positive alcohol test or how did he respond to that?
>
> A. He said he had consumed six beers and a couple of shots, but had quit drinking at 5 p.m. and then after 5 he slept prior to going to work. He said he never drank on the job and that there was testing for six hours that day, so he had been sleeping in the hole and when he woke up he was drowsy and that's when his slip-and-fall occurred.[13]

Ms. Dater again spoke with claimant on April 2, 2014, and informed him his claim was still under investigation. She told claimant it was her understanding he had a positive alcohol test and positive marijuana test. Ms. Dater said, "He didn't deny it, he really didn't say anything. I just told him as soon as compensability was determined, we would let him know."[14] The next day, Ms. Dater informed claimant his claim was denied and a denial letter would be sent to claimant's home address. Ms. Dater relayed this information to Ms. Chambers and Ms. Frost. Ms. Frost testified she closed her file once the claim was denied. Ms. Chambers noted she had no contact with claimant after April 9, 2014. Claimant was discharged from Via Christi on April 10, 2014.

Respondent's policy is to terminate employees who test positive for drugs or alcohol. Claimant testified he was terminated on March 25, 2014. Claimant stated he was informed while in the hospital he was no longer employed with respondent due to the positive drug test, though he could not recall the name of his informant. Mr. Johnson agreed respondent followed its procedure and policy in terminating claimant.

Dr. Chris Fevurly provided a report dated August 5, 2014, at respondent's counsel's request. Dr. Fevurly did not meet or examine claimant, but rather reviewed claimant's medical records related to the work accident. Dr. Fevurly concluded:

> The blood alcohol level was not obtained until 2 to 3 hours after the work injury and it is reasonable to believe that that [*sic*] his blood alcohol may have been as high as 0.17 to 0.2 at the time of the work event. (It depends on how fast his liver metabolizes alcohol.) There is no doubt that this level of alcohol will have physiologic effects at these blood levels. . . . The blood alcohol level obtained in this circumstance is high enough to have impaired his ability to safely perform his duties (which included work at heights).

---

[13] Dater Depo. at 8-9.

[14] *Id*. at 9.

> There is no way to know whether he was acutely under the influence of marijuana at the time of the work event. The marijuana metabolite, THC will remain in the urine for up to four weeks after the last use of the drug and this urine drug screen documents prior use of marijuana but does not confirm that he was acutely under the influence of this drug at the time of the work accident.[15]

Claimant has not worked since March 25, 2014. Claimant testified he has not applied for unemployment benefits, but has applied for Social Security Disability benefits. Claimant's Social Security Disability application was pending at the time of preliminary hearing. Claimant stated he continues to experience stinging pain in his left leg and left ankle and cramping in his left hip. Claimant further noted he was actively looking for work at the time of the hearing.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501 states, in part:

> (b) (1) (A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.
>
> (B) In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.
>
> (C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:
>
> Confirmatory test cutoff levels (ng/ml)
>
> Marijuana metabolite[1]. 15
> Cocaine metabolite[2]. 150
> Opiates:
> Morphine. 2000

[15] P.H. Trans., Resp. Ex. 1 at 3.

Codeine	2000
6-Acetylmorphine[4]	10 ng/ml
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine[3]	500

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.

[2] Benzoylecgonine.

[3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.

[4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

(E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

(2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

> (3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:
>
> (A) The test sample was collected within a reasonable time following the accident or injury;
>
> (B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
>
> (C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
>
> (D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;
>
> (E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and
>
> (F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[17]

ANALYSIS

1. Are the results of claimant's drug urinalysis testing admissible?

The ALJ stated it was impossible to say that the urinalysis test results were from the sample taken from claimant. The undersigned disagrees. The legislature chose to apply the reasonable doubt standard for the admission of chemical test results, which mirrors the

[16] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[17] K.S.A. 2013 Supp. 44-555c(j).

foundation requirements required in criminal cases. Reasonable doubt does not need to be defined because the words themselves describe the meaning.[18]

The chain of custody was adequately recorded to prove the sample tested was, in fact, the sample provided by claimant. The Court of Appeals in *State v. Williams* wrote:

> The chain of custody requirements have been set forth by this court in *State v. Treadwell*, 223 Kan. 577, Syl. ¶ 2, 575 P.2d 550, as follows:
>
> "When objects of physical evidence have been kept in police custody the chain of possession must be reasonably complete, but this rule may be relaxed when the object is positively identified at the trial and it is established the object remains unaltered."[19]

Mr. Martinez completed a non-federal drug testing form which was bar-coded and identified the sample as "specimen ID number 2004145291."[20] The claimant wrote his date of birth and verified the sample by signing the form. The sample was released to FedEx on March 25, 2014. According to the form, the sample was received with the primary specimen container intact, and with the same ID number, on March 27, 2014, by N. Albakhiet.

The testing, on what was referred to as Slip ID 2004145291 by Clinical Reference Laboratory (CRL), was certified by Kathleen Strano.[21] The certified report showed a marijuana metabolite level of 50 ng/ml. The positive result was verified by Dr. Paine on March 31, 2014, on the non-federal drug testing form. The undersigned finds respondent has proven, beyond a reasonable doubt, the test results were from the sample taken from claimant. The ALJ erred in excluding the drug urinalysis test results.

2. Has claimant overcome the presumption of contribution by clear and convincing evidence?

The ALJ found clear and convincing evidence that claimant rebutted the presumption that clamant's alcohol consumption contributed to his injury. The ALJ cited the testimony of claimant's coworkers and supervisor alleging claimant did not act in a manner suggesting he was impaired. The ALJ cited *Reed v. Plastic Packaging*

---

[18] See *State v. Dunn,* 249 Kan. 488, 493, 820 P.2d 412 (1991).

[19] *State v. Williams*, 235 Kan. 485, 492, 681 P.2d 660 (1984); citing *State v. Treadwell,* 223 Kan. 577, 575 P.2d 550 (1978)

[20] Paine Depo., Ex. 1 at 3.

[21] See *Id*. at 4.

Technologies LLC[22] as precedent for finding if claimant does not look impaired, the impairment did not contribute to the injury. The undersigned disagrees.

Claimant's blood alcohol level was .144, over three and one-half times the amount creating the presumption contained in K.S.A. 2013 Supp. 44-501(b)(1)(C). The urinalysis showed a marijuana metabolite level of 50 ng/ml, more than three times the threshold amount creating the presumption of contribution.

The facts in *Reed* are distinguished from this case. Mr. Reed was injured by items that fell on him from a shelf, at no fault of his own, while he was driving a fork lift. At the time of his injury, Mr. Reed had been driving the forklift approximately 11 hours of a 12-hour shift prior to the accident without any incident or appearance of impairment. Also, Mr. Reed tested positive for marijuana metabolite, not both marijuana metabolite and alcohol.

In this case, claimant slipped and fell, which is a matter of coordination. Claimant had only worked a short time after the completion of the drill stem test and the injury. Claimant testified he returned to work activities between 4:45 a.m. and 5:00 a.m. on the morning of March 25, 2014. Richard Johnson's testified he was advised of claimant's injury at approximately 5:00 a.m. on March 25, 2014. By 6:45 a.m., less than two hours later, claimant was at Via Christi in Wichita being examined by Rhonda Schmeidler.[23] The accident occurred southwest of Kingman, Kansas.[24]

The testimony of the coworkers does not outweigh the evidence that the impairment contributed to the injury. The testimony of the coworkers is inconsistent with the testimony of Dr. Bruey, who ordered the blood alcohol test because claimant smelled of alcohol. Dr. Fevurly believed claimant's blood alcohol level was high enough to have impaired his ability to safely perform his duties. Dr. Fevurly had no doubt claimant's blood alcohol level had a physiological effect. Dr. Fevurly's opinions in this regard are uncontradicted.

Claimant failed to rebut the presumption that his impairment contributed to the injury considering the combination of high blood alcohol and marijuana metabolite levels, the short amount of time between claimant's return to work after the drill stem testing and the injury, Dr. Fevurly's opinion regarding the effects of such a high blood alcohol level, and Dr. Bruey testifying claimant smelled of alcohol two hours after the accident.

---

[22] *Reed v. Plastic Packaging Technologies LLC*, No. 1,061,812, 2013 WL 485717 (Kan. WCAB Jan. 29, 2013).

[23] See Schmeidler Depo., Ex. 1 at 1.

[24] See Granger Depo. at 4.

CONCLUSION

Claimant failed to rebut the presumption that he was impaired due to alcohol or drugs created by K.S.A. 2013 Supp. 44-501(b)(1)(c) and that his impairment did not contribute to his injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Ali Marchant dated November 14, 2014, is reversed. This claim is barred by K.S.A. 2013 Supp. 44-501(b)(1)(A).

IT IS SO ORDERED.

Dated this _____ day of January, 2015.

_____
HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
rob@ksworkcomplaw.com
fdesk@ksworkcomplaw.com

Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
drakestraw@mcdonaldtinker.com
cwise@mcdonaldtinker.com

Ali Marchant, Administrative Law Judge